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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

No. ~~481~~ 37

HEWITT-ROBINS INCORPORATED,  
*Petitioner,*

*v.*

EASTERN FREIGHT WAYS, INC.,  
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR THE RESPONDENT  
IN OPPOSITION**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1961

No. 491

HEWITT ROBINS INCORPORATED,

*Petitioner,*

EASTERN FREIGHT WAYS, INC.,

*Respondent,*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR THE RESPONDENT  
IN OPPOSITION**

**Opinions Below**

The majority opinion of the Court of Appeals for the Second Circuit, and the dissenting opinion of Judge Moore, are officially reported at 293 F. 2d 295.

**Question Presented**

The respondent is dissatisfied with the petitioner's presentation of the "Question Presented". Rules of U. S. Supreme Court, Rule 40(3).

The gravamen of the complaint is that the respondent's established routing practice, followed and applied to petitioner's 350 shipments for more than two years, was unreasonable within the meaning of Section 216 of Part II of the Interstate Commerce Act (49 U.S.C. 316) (hereinafter sometimes referred to as the "Act"). Pursuant to paragraph 8 of the complaint, the petitioner obtained a ruling from Division 3 of the Interstate Commerce Commission (*one Commissioner dissenting*) to the effect that the respondent's routing practice was unreasonable within the meaning of Section 216 of the Act, and an order was entered directing the respondent to cease and desist from said practice. *Hewitt-Robins Incorporated v. Eastern Freight Ways, Inc.*, 302 I.C.C. Reports 173 (1957). Thereafter, upon the authority of this Court's decision in *T.I.M.E., Inc. v. United States*, 359 U. S. 464 (1959), the District Court dismissed the complaint upon the grounds that the Act did not create a statutory cause of action to recover reparations for unreasonable routing practices, nor did it preserve any previous common-law right of recovery. The Court of Appeals affirmed, one judge dissenting.

It is respectfully submitted that under the theory of petitioner's complaint, the only question presented is

Whether Part II of the Interstate Commerce Act creates a statutory cause of action whereby a shipper of goods may, in post-shipment litigation, challenge a motor carrier's regular routing practice as unreasonable within the meaning of Section 216 of the Act and, upon a finding to that effect by the Interstate Commerce Commission, recover the difference between (a) the rates charged in accordance with applicable filed tariffs and (b) the rates applicable to the route found by the Commission to be more reasonable.

### Statute Involved

Under the respondent's view of the "Question Presented", the entirety of Part II of the Interstate Commerce Act (49 U.S.C. : 301-327) is involved herein, although the statutory provisions which are most directly relevant to decision of this case, and the pertinent texts of which are set forth in the Appendix hereto, are subdivisions (b) and (c) of Section 216 of the Act (49 U.S.C. : 316(b) and (c)).

### Statement

Petitioner's statement of the case contains most of the material facts alleged in the First Count of the complaint. However, it merely glosses over the fact which is most material to the issue, *viz.* that the respondent's alleged liability is specifically and repeatedly predicated solely upon its alleged failure to maintain a reasonable routing practice within the meaning of Section 216 of the Act. (R. 3a, 4a) It may also be added that the respondent's answer denies petitioner's allegations of unreasonableness and contains three affirmative defenses, the third of which alleges, *inter alia*, that the petitioner agreed to the use of respondent's interstate route by way of respondent's New Jersey terminal for the purpose of assembly and or breakdown and delivery, and that petitioner's, less than full load shipments could not be handled as direct intra-state shipments. (R. 9a-10a) Thus, the reasonableness of respondent's routing practice was drawn in issue by the pleadings and was thereafter administratively resolved adversely to the respondent by the Interstate Commerce Commission. *Hewitt-Robins Incorporated v. Eastern Freight Waus, Inc., supra.*

## ARGUMENT

**The petitioner has failed to show any special or important reason why this Court, in the exercise of sound judicial discretion, should review this case on writ of certiorari.**

Rule 19(1)(b) of the Rules of this Court, though neither controlling nor fully measuring this Court's discretion, sets forth the character of reasons which will be considered in passing upon a petition for certiorari to a court of appeals. The petitioner attempts to make out two of those reasons, *viz.* that the Court of Appeals for the Second Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court; and that the decision below is allegedly "irreconcilable" with that of the Third Circuit in *Woolleyhan Transportation Co. v. George Rathbun Co.*, 162 F. 2d 1016 (1947). The respondent, however, respectfully submits that neither those nor any other reasons exist for granting the writ.

### **There is No Important Question of Federal Law Which Has Not Been Settled by this Court**

The dismissal of the petitioner's complaint was mandated by the only reasonable application of the principles so carefully explained by this Court in *F.I.M.E., Inc. v. United States*, 359 U. S. 464 (1959). Viewing the question as one of congressional intent, this Court held that Part H of the Interstate Commerce Act did not create a statutory cause of action, nor did it preserve any previously existing common law remedy, whereby a shipper of goods by motor carrier can challenge in post-

shipment litigation the reasonableness of the carrier's charges made in accordance with the governing tariff. This Court's rationale compels precisely the same legal conclusions with regard to a shipper's attempt in post-shipment litigation to obtain reparations based upon a challenge to the reasonableness of a motor carrier's regular and established routing practice.

A. *Regarding a statutory remedy.* The petitioner's abandonment of efforts made below to sustain the existence of a statutory remedy makes that no less the issue in this case. Though the petitioner is silent, its complaint is not. As noted (*supra*, page 2), that pleading predicates the respondent's alleged liability upon a breach of the duty imposed by Section 216 of the Act. Subdivision (b) of Section 216 provides, in part:

"(b) It shall be the duty of every common carrier of property by motor vehicle . . . to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto . . ."  
(Emphasis supplied.)

In the *T.I.M.E.* case, this Court specifically refused to imply a statutory cause of action predicated upon a violation of the duties established in Section 216(b). Relying upon its decision in *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U. S. 246 (1951), this Court held that Section 216(b) plainly creates only a criterion for administrative application rather than a justiciable legal right. Although the precise duty in issue in the *T.I.M.E.* case was the duty to establish reasonable rates, the foregoing interpretation was very evidently placed upon the entirety of Section 216(b) and the several duties contained therein, all of which are equally subject

to the primary jurisdiction and control of the Interstate Commerce Commission. It would be an anomaly, indeed, to hold that one duty creates a justiciable legal right whereas another imposed by the same subdivision merely prescribes a criterion for administrative application.

It would unduly lengthen this brief to restate the reasons which prompted this Court's ruling in *T.I.M.E.* The respondent submits that the "Question Presented" herein was very clearly settled by this Court in *T.I.M.E.*, and that the petitioner's complaint has been properly dismissed.

B. *Regarding a common-law remedy.* The respondent is constrained to answer the moot argument made by petitioner.

The petitioner attempts to fob off the entire theory of its complaint by characterizing its averment regarding respondent's alleged violation of Section 216 as mere "conclusion of law" (Pet., p. 3). Having thus disclaimed its pleading as well as its own proceeding under Section 216 before the Interstate Commerce Commission, the petitioner now argues that the respondent is subject to a surviving *common-law* duty for the violation of which the respondent may be compelled to pay reparations.

The first obvious fallacy in petitioner's position is that there is no *surviving* common-law duty. The enactment in 1935 of Part II of the Interstate Commerce Act brought the relatively new industry of common carriage by motor vehicle under the federal administrative control to which certain other common carriers had theretofore been subject under Part I of the Act. Section 216 of the Act prescribed certain standards and imposed certain duties by which motor carriers would thereafter be bound. It is fundamental that those standards and duties superseded

any and all standards, statutory or otherwise, which may have theretofore obtained with respect to the same subject matter. Respondent is bound only by the duty prescribed by Section 216(b) as properly construed by the Interstate Commerce Commission. There is no dual standard. If a routing practice is deemed reasonable by the Commission within the meaning of Section 216, it is not subject to attack by any other standard. If it should be held to violate that section, then no other standard is competent to justify it.

As was held by the Commission in the instant case, "misrouting is an unreasonable practice violative of the provisions of Section 216(b) of the act". *Heardt Robins Incorporated v. Eastern Freight Ways, Inc.*, 302 I.C.C. Reports 173, 174 (1957). Whether a routing practice is unreasonable falls squarely within the primary jurisdiction of the Interstate Commerce Commission.

*Great Atlantic & Pacific Tea Co. v. Ontario Freight Lines Corp.*, 46 I.C.C. 237, 238-239 (1946);

*Ct. Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, 483 (1918).

This basic proposition was effectively conceded by petitioner when it referred the question of unreasonableness to the Commission. What, then, must petitioner's position be? It is that Section 216(j) of the Act preserved a hybrid form of action whereby a general right of recovery at common-law survives in favor of a shipper, based, however, upon a violation of a statutory duty imposed by Section 216(b) and a finding to that effect by the Interstate Commerce Commission in the exercise of its primary jurisdiction to administer the Act. In principle, this is

precisely the same contention made by the Government and rejected by this Court in the *T. I. M. E.* case. The essence of its decision is contained in the following statement by Justice Harlan, writing for the majority:

"We do not think that Congress, which we cannot assume was unaware of the holding of the *Abilene* case that a common-law right of action to recover unreasonable common carrier charges is incompatible with a statutory scheme in which the courts have no authority to adjudicate the primary question in issue, intended by the savings clause of §216(j) to sanction a procedure such as that here proposed. It would be anomalous to hold that Congress intended that the sole effect of the omission of reparations provisions in the Motor Carrier Act would be to require the shipper in effect to bring two lawsuits instead of one, with the parties required to file their complaint and answer in a court of competent jurisdiction and then immediately proceed to the I.C.C. to litigate what would ordinarily be the sole controverted issue in the suit. No convincing reason has been suggested to us why Congress would have wished to omit a direct reparations procedure, as it has concededly here done, and yet leave open to the shipper the circuitous route contended for" (at page 474).

The petitioner attempts to avoid the application of the *T. I. M. E.* case by pressing the inconsequential point that there the issue involved rates "*intrinsically* unreasonable" or "unreasonable *per se*" (Pet., p. 7). It may be admitted that a technical distinction exists between a claim that a rate is unreasonable in itself and a claim that an unreasonable routing practice has resulted in the application of a rate in excess of the rate applicable to the reasonable route. However, such a distinction is without any significance in the context of the question here presented and it

does not avoid the effect of the *T. I. M. E.* case as binding precedent against the petitioner. The reasonableness of a routing practice, no less than the reasonableness of a rate, is a question exclusively for administrative determination by the Interstate Commerce Commission. That is the controlling factor which brings this case squarely within the rationale of the *T. I. M. E.* case.

The petitioner further attempts to avoid the effect of the *T. I. M. E.* case by conjuring up an image of the motor carrier industry preying upon "unprotected shippers by resorting to the technique of misrouting shipments and mulcting the shipping public of millions of dollars a year without fear of civil prosecution." (Pet., p. 11) This statement is patently misleading and constitutes a crude attempt to forge a question of national interest. In the first place, a routing practice found to be unreasonable under Section 216 does not fill the coffers of the erring carrier to overflowing where, as here, the rate charged is admittedly in accordance with filed tariffs and applicable to the route employed. In such instances, the carrier collects only that sum which is reasonable for the service actually rendered. The illusion of a pilaging and unprincipled industry is hardly appropriate. Secondly, Section 216(e) of the Act accords the shipper the right at any time to challenge a routing practice before the Interstate Commerce Commission which, if it should find against the carrier, may forever restrain it. Contrary to the argument of petitioner, and with due deference to the view of Judge Moore in his dissenting opinion, such a proceeding may be instituted not only as to a routing practice in effect, but also as to one "*proposed to be put into effect*" 49 U.S.C. §316(e). (Emphasis supplied.) This is complete protection against a practice which, viewed most severely, can

be regarded as nothing more than a good faith failure to comply with a statutory standard. The petitioner's complaint does not allege bad faith on the part of respondent. It does not allege that respondent profited in the amount of the sum sought to be recovered. In point of fact it could not, for as noted, the rate paid was the fair charge for the service rendered. If the petitioner succeeded, the respondent would be subjected to a considerable loss on the transactions involved.

This is not a case of overcharges which, as defined by the Act, are "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." 49 U.S.C. §304a (5):

*Kahn, Principles of Motor Carrier Regulation*, 156 (1958):

*Great Atlantic & Pacific Tea Co. v. Ontario Freight Lines Corp.*, *supra*, at 239:

*Cf. Brown Coal Co. v. Director General*, 87 L. C. C. 130, 131 (1923).

The common-law cause of action for overcharges is specifically recognized and preserved by the Act. 49 U.S.C. §304a (1). Judge Moore in his dissent seems to have misinterpreted this as a case involving overcharges (Pet., pp. 18-19).

### Summary

Regardless of how the "Question Presented" herein may be viewed, this case presents no important question of federal law which was not thoroughly reviewed and settled in the *T.I.M.E.* case. The petitioner's complaint was properly dismissed under the authority of *T.I.M.E.*

11

**There is No Conflict Between the Decision Below  
and the *Wooleyhan* Case**

There is no merit to the petitioner's suggestion that the decision below is irreconcilable with the decision of the Court of Appeals for the Third Circuit in *Wooleyhan Transportation Co. v. George Rutledge Co.*, 162 F. 2d 1016 (1947). There, the plaintiff carrier and defendant shipper specifically agreed on the rate for the intrastate carriage of goods between two points in the State of New Jersey. However, the carrier unilaterally employed an interstate route and thereafter commenced an action to recover on the basis of the higher interstate rate. No claim was made by the carrier to justify its use of the interstate route. The Third Circuit upheld the nonsuit directed at the end of plaintiff's case, stating that the carrier could not unilaterally change the specific agreement as to rates. There was no question in the *Wooleyhan* case concerning the reasonableness of a routing practice, the jurisdiction of the Interstate Commerce Commission, or the effect of the Interstate Commerce Act upon the right of recovery. In short, there is no parallel between this case and the *Wooleyhan* decision, and therefore there can be no conflict. Even if there were conflict, it would be of no moment since the intervening decision of this Court in *T.I.M.E.* would clearly settle any doubt as to the correct law applicable to the question here presented.

It is unnecessary to discuss the other authorities cited by petitioner. They simply have no direct bearing on the issue.

# CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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*Of Counsel*

**APPENDIX**

Subdivisions (b) and (c) of Section 216 of Part II of the Interstate Commerce Act, 49 U. S. C. 316(b) and (c) provide as follows:

"(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

"(c) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and for express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate,

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fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."